

April 30, 2012

Andrea S. Visveshwara
Assistant City Attorney
990 Palm Street
San Luis Obispo, CA 93401-3249

Re: Your Request for Informal Assistance
Our file No. I-12-053

Dear Ms. Visveshwara:

This letter responds to your request for advice on behalf of Jaime Hill, Cultural and Historical Commission Member, regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented in your request. The Commission does not act as a finder of fact when issuing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Our advice is applicable only to the extent that the facts provided to us are correct, and all material facts have been presented. Additionally, our advice is limited to the provisions of the Act. We do not address issues related to common law conflicts of interest or to her agency’s incompatible activities statement.

Because your question is general in nature and does not refer to any specific governmental decision, we are treating your request as one for informal assistance.²

QUESTIONS

1. Would a member of the Cultural Heritage Committee have a conflict of interest in decisions in which her employer is directly involved?
2. Does the Act prevent a public official from accepting employment with a company that contracts with a public entity?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

CONCLUSIONS

1. Yes, if the decision would have any financial effect on her employer.
2. The Act does not restrict a public official from accepting private employment.

FACTS

You are the city attorney for the city of San Luis Obispo and you represent Jaime Hill in this request for advice. The San Luis Obispo City Council appointed Ms. Hill to the Cultural Heritage Committee (“the CHC”) in 2011. The CHC is an advisory body whose purpose is to promote the preservation of architectural, archaeological, historical, and cultural resources in San Luis Obispo by: a) helping the public pursue cultural resource preservation projects; b) sponsoring educational programs and research that improves understanding of the community's history and archaeology; c) upon request, commenting on the effects of public and private actions on community cultural resources; and d) helping with the administration of city-sponsored benefit programs.

Ms. Hill’s professional background is as a planner; she is considering an offer with a local environmental consulting firm (“the Firm”) as an independent contractor for certain projects. Ms. Hill’s responsibilities would include: project management, development and environmental processing, and working with responsible agencies and project proponents. She may represent the Firm’s clients before the San Luis Obispo City Council or its advisory bodies, excluding the CHC.

San Luis Obispo occasionally hires outside consultants to act as extension of city staff to perform certain duties, such as writing requests for proposals or grant applications, and processing project applications on its behalf. Currently, the city is in the process of updating part of its General Plan. The city has contracted with the Firm to assist with this process. As part of the process, the Firm will represent the city, as an applicant, in front of the CHC to discuss portions of the General Plan Update that relate to preservation of certain historical and cultural resources. If hired by the Firm, Ms. Hill would not work on the General Plan Update. San Luis Obispo also hired the Firm to work on a housing project. This project is unlikely to be considered by the CHC as it presents no known historical or cultural issues.

ANALYSIS

The Act’s conflict of interest rules prohibit a public official from making, participating in making, or using his or her official position in any way to influence a governmental decision in which the official knows, or has reason to know, that he or she has a “financial interest.” (Section 87100.) Section 87103 provides that a public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally,

on the official, a member of his or her immediate family, or on any of the official's economic interests.

Under the Act, a conflict of interest exists only when a public official has a financial interest in a particular governmental decision. To determine whether a public official has a "conflict of interest" in a specific governmental decision, we employ a standard eight-step analysis outlined in Regulation 18700(b).

Steps One and Two: Is Ms. Hill a Public Official Making, Participating in Making, or Influencing a Governmental Decision?

Ms. Hill is a public official by virtue of her position on the CHC. (See Section 82048.) You explained that the CHC makes recommendations to the City Council, and also makes decisions regarding particular parcels and their historical and cultural significance. Decisions regarding the city's General Plan may come before the CHC.³ Ms. Hill will therefore be making governmental decisions in her position as a committee member for CHC.

If a governmental decision is within or before the public official's own agency or an agency appointed by or subject to the budgetary control of the public official's agency, the official may be making or 'influencing' a decision. (Regulation 18702.3(a).) In these cases, if "the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency" then he or she is attempting to influence a governmental decision. Because the city council is not subject to the budgetary control of the CHC, Ms. Hill will not be presumed to be making, participating in making, or influencing city council's decisions.

Step Three: What are Ms. Hill's Economic Interests?

A public official has a financial interest in a decision within the meaning of Section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any one of five enumerated economic interests. (Section 87103; Regulations 18703-18703.5.)

The applicable economic interests include:

- An interest in a business entity in which a public official has a direct or indirect investment of \$2,000 or more. (Section 87103(a), Regulation 18703.1(a).)

³ You have explained that decisions regarding the housing project will not come before the CHC and we therefore do not include that as a possibility.

- An interest in any business entity in which a public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d), Regulation 18703.1(b).)
- An interest in real property in which a public official has a direct or indirect interest of \$2,000 or more. (Section 87103(b), Regulation 18703.2.)
- Any source of income, including promised income, to the public official that aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c), Regulation 18703.3.)
- Any source of gifts to the public official if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e), Regulation 18703.4.)
- A public official also has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is also known as the “personal financial effects” rule. (Section 87103, Regulation 18703.5.)

Ms. Hill is considering a job as an independent contractor with the Firm. If she does so, the Firm will be a source of income to her. Additionally, a public official always has an interest in her personal finances and those of his or her immediate family and may have a conflict of interest in any decision resulting in an increase or decrease in the personal expenses, income, assets or liabilities of the official or his or her immediate family. (Section 87103; Regulation 18703.5.) You have not offered any facts to suggest that there will be a decision before the CHC that would affect Ms. Hill’s personal finances independent of her potential source of income.

Ms. Hill’s source of income appears to be the only economic interest at issue. Our analysis is therefore limited to the identified source of income economic interest.

Step Four: Is Ms. Hill’s Economic Interest Directly or Indirectly Involved in the Governmental Decisions?

The governmental decisions at issue would be presented by the Firm, as applicant, to the CHC and by the Firm to the City Council and the Planning Commission. Ms. Hill has said that she would not work on the projects for the Firm that are related to the General Plan, which could have issues before the CHC. She may work on the housing project issues for the Firm, which are unlikely to come before the CHC but will come before the city council.

Ms. Hill is not a member of the city council nor is the city council under the budgetary control of her commission. The only decisions at issue are those before the CHC. Her only economic interest is in the potential income from the Firm.

For governmental decisions that affect sources of income, the standards set forth in Regulation 18704.1(a) apply. Regulation 18704.1(a) states:

“(a) A person, including business entities, sources of income and sources of gifts, is directly involved in a decision before an official’s agency when that person, either directly or by agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

As the Firm will be initiating proceedings before the CHC to further the General Plan, it will be directly involved. Ms. Hill’s source of income is therefore directly involved in these potential governmental decisions.⁴

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on Ms. Hill’s economic interests?

Any reasonably foreseeable financial effect on a source of income that is directly involved in a governmental decision is deemed material. (Regulation 18705.3.)

Because we do not have information about particular decisions, and you have not indicated any potential financial effects that may result from such decisions, it would be impossible for us to opine on whether the governmental decisions would have a reasonably foreseeable material financial effect on the Firm. This is a decision that Ms. Hill must make once the decisions come before the CHC.⁵ We encourage you to seek further advice once the governmental decisions are identified.

You have also posed employment scenarios for Ms. Hill. The Act does not prevent an individual from accepting employment. She may therefore accept employment with the Firm whether the Firm is contracting with San Luis Obispo or another entity. While she

⁴ Regulation 18704(a) provides: “In order to determine if a governmental decision’s reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official’s economic interest is directly involved or indirectly involved in the governmental decision. If a public official’s economic interest is not directly involved in a governmental decision, it is indirectly involved.”

⁵ For your information, we are enclosing a copy of Regulation 18702.5, which explains the process if a public official has a conflict of interest on a particular matter.

would not be able to appear before her own committee, she would be able to perform the duties of her employment in all other capacities.⁶

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Heather M. Rowan
Counsel, Legal Division

HMR:jgl

Enclosure

⁶ You provided us with a sample contract between the Firm and the city of San Luis Obispo. The city would be contracting with the Firm, rather than a particular employee at the Firm.